Supreme Court, U.S.
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In The

# Supreme Court of the United States

ARBEN SKENDAJ,

*Petitioner*,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Third Circuit Court of Appeals deny the petitioner his fundamental rights to due process under the Fifth Amendment by affirming the Board of Immigration Appeal's denial of petitioner's motion to reopen in an egregious departure from the accepted and usual course of judicial proceedings?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Arben Skendaj asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit, *Skendaj v. Attorney General of the United States*, Docket No., 08-2928 (3d Cir. 2009), is attached to this petition as **Appendix A**. The agency opinions issued by the Immigration Judge, then adopted and affirmed by the Board of Immigration Appeals, *In re Arben Skendaj*, No. 099-589-904 (Immigration Judge September 29, 2006) (BIA June 9, 2008), are attached hereto as **Appendices B and C**.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered its judgment denying the timely submitted petition for rehearing on December 1, 2009. The Court of Appeals denied Skendaj's timely petition for review of the decision of the Board of Immigration Appeals on September 1, 2009. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprives Mr. Skendaj of his rights as granted under the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the substantial evidence standard, as a means of reviewing a claim for asylum. The Circuit Court in applying the substantial evidence standard to review the matter of Arben Skendaj misapplied the standard by failing to review the record in a cumulative manner. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Skendaj's Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

Petitioner, Arben Skendaj was born on January 13, 1967 in Patos, Albania. Mr. Skendaj married his wife Nereida in Albania on September 21, 1997. Nereida's father, Teki Faslliaj was a prominent Democratic Party leader in Patos, Albania. As a result of his position, Mr. Faslliaj received threats at home, which included threats against his family members. In 1997, when the Socialists returned to power, the persecution worsened. During this time, Mr. Faslliaj received

threatening phone calls, which included threats against his daughters.

Mr. Skendaj and his wife, Nereida, were scheduled to wed in the spring following their actual wedding in November 1997, but because of the mounting threats, the wedding was moved ahead. On the day of the wedding, gun shots were heard outside the restaurant and the wedding celebration was cut short as a result.

For the two months immediately following the wedding, the newlyweds lived with Mr. Skendaj's family. Despite moving away from Mr. Skendaj's politically active father-in-law, threatening phone calls continued. Callers threatened Petitioner saying: "you married the daughter of the enemy of the Socialist Party." Then callers would threaten: "we're taking your wife. We're going to take your wife."

When Petitioner's wife asked her father when she would finally escape the Socialist's threats, Mr. Faslliaj responded that despite the fact that she had gotten married, she would never "be at peace." Thus, the young couple had no choice but to flee their homeland, Albania, escaping to Greece on November 28, 1997, because their lives were constantly in danger, threatened by members of the Socialist party.

Mr. Skendaj and his wife lived in Greece from November 28, 1997 until November 23, 2003. In Greece, they were issued temporary documents valid for six months, which had to be renewed twice a year. During their time in Greece, Petitioner had a son, Rafaelo, who was born in Greece in 2000.

In June of 2002, the family made their one and only trip to Albania during their six years in Greece. Mr. Skendaj and his family returned for seven days in order to see his father-in-law Mr. Faslliaj, before he left for the United States. During this trip, Mr. Skendaj and his family suffered a most horrifying ordeal involving the attempted abduction of his son.

Three days into the trip to Albania, the family took a taxi heading for Mr. Faslliaj's apartment. As they neared Mr. Faslliaj's home, the taxi slowed and prepared to stop. Suddenly, two motorcycles approached the taxi from the rear, one on the left and the other on the right. All of a sudden, the rider on the left called out, "The window's open, the son, the boy." One of the riders had his hand by the open window, attempting to grab Rafealo. Mr. Skendaj's wife dropped down in her seat, grasping her two year old child tightly and screamed out, "Benny, what are we going to do, what happened?" The driver hit the gas and sped through some narrow streets until they lost sight of the motorcycles. Once they were satisfied that they were sufficiently safe, Mr. Skendaj called his father-in-law to pick them up. The family was taken back to Mr. Faslliaj's apartment, where they stayed for the remainder of the trip.

The family took every reasonable precaution to prevent any problems on their return trip to Greece.

On December 24, 2003, Greek police apprehended Petitioner and he was returned to Albania. This arbitrary action by the Greek police convinced Mr. Skendaj that he could not safely relocate to Greece. Therefore, he made arrangements to come to the United States, where he sought political asylum.

## REASONS FOR GRANTING THE PETITION

The Third Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings.

### A. The Court of Appeals for the Third Circuit Arbitrarily and Capriciously Misapplied the Substantial Evidence Standard in Reviewing the Merits of the Skendaj's Application for Asylum

The Petitioner respectfully contends that the Court of Appeals for the Third Circuit arbitrarily misapplied the substantial evidence standard in the instant matter. This Honorable Court should review the decision of the Third Circuit Court below, as the same was in contravention of the Court's precedent and arbitrarily and capriciously failed to investigate whether the decision to deny relief to the Petitioner could pass muster under the substantial evidence standard which has been elaborated by this Honorable Court. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *see also Wiransane v. Ashcroft,* 366 F.3d 889, 887 (10th Cir. 2004); *Capric v. Ashcroft*, 355 F.3d 1075, 1086 (7th Cir. 2004).

In the context of immigration matters, the substantial evidence test is the applicable standard of review of removal decisions. *See* INA §242(b)(4)(B), 8 U.S.C. §1252(b)(4)(B). Under the substantial evidence standard, a final agency determination will be reversed if it is not supported by "reasonable, substantial and probative evidence on the record as a whole." *See* 8 U.S.C. §1105(a)(4). *See also INS v. Elias-Zacarias*, 502 U.S 478, 481 (1992). Traditionally, the

substantial evidence test requires that the reviewing agency, in determining matters, rely on more than a "scintilla" of evidence and that it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *See also Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006). Accordingly, in order to find that such a scintilla of evidence exists, the Court is bound to review the evidence submitted as to evaluate whether the evidence being offered is so "relevant [...] as a reasonable mind might accept as adequate to support a conclusion." *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1961), this Honorable Court further elaborated the appropriate standard for the application of the substantial evidence test finding that in order to be properly deemed applied the evidence being proffered *must be substantial* after taking into account "whatever in the record detracts from its weight." Under the substantial evidence standard, the final agency determination will be reversed if not supported by "reasonable, substantial and probative evidence on the record as a whole." *See* 8 U.S.C. §1105(a)(4); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir. 2003) (*quoting Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)). In this case, the "record as a whole" does not support the Board's decision below.

In the asylum, withholding and CAT context, the substantial evidence standard mandates reversal only where the reviewing court finds that the evidence not

only supports a contrary conclusion, "but compels it." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (emphasis added). In *Palavra v. INS*, 287 F.3d 690 (8th Cir. 2002) the court relied on the standard in *Universal Camera Corp.* and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) and reversed the finding of removal for failure to consider evidence which was contained in the record. Similarly, sister Courts to the Third Circuit in applying this standard have found that a decision to deny relief cannot be supported when it fails to comply with these tests. Specifically, in *Ding v. Ashcroft,* 387 F.3d 1131, 1136 (9th Cir. 2004), an Immigration Judge's decision was reversed in a Chinese forced abortion and birth control opposition case because the Immigration Judge had made an adverse credibility finding which was ultimately found to be unsupported by substantial evidence as it was based upon speculation, conjecture and an inappropriate legal standard. Similarly also, in *Alvarado-Carillo v. INS*, 251 F.3d 44, 49 (2d Cir. 2001), the Second Circuit reversed the Board of Immigration Appeal's denial of asylum and noted that more than a mere scintilla of evidence was necessary to compel a conclusion of a negative finding. Various other matters seeking the analogous relief of asylum, withholding and relief under Article III of the Convention Against Torture have come under consideration in courts below with regard to the appropriate application of the substantial evidence standard. *See e.g Uwase v. Ashcroft*, 349 F.3d 1039 (7th Cir. 2003)(*reversing* IJ determination not based upon substantial evidence and where undue weight was given to lack of corroborating testimony); *Qui v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003) (*reversing* denial of asylum where BIA failed to support its findings by substantial evidence and failed to consider key elements in the record); *Georgis v. Ashcroft*, 328

F.3d 962, 967–70 (7th Cir. 2003) (*reversing* denial of asylum under *Elias-Zacarias* standard where minor inconsistencies would have been easily resolved by other facts in evidence and could have been explained by improperly excluded evidence); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003)(*reversing* Board's adverse credibility determination under the substantial evidence standard).

In this case, the Third Circuit, in finding that the harm perpetrated against Mr. Skendaj was not based upon a protected ground, failed to consider the substantial evidence that the persecution suffered was on account of Mr. Skendaj's membership in a particular social group, his family.

**B. The Persecution Was Motivated by Petitioner's Membership in a Particular Social Group, a Protected Ground under the Immigration and Nationality Act.**

The Third Circuit has held that,

> In *Fatin v. INS*, 12 F.3d at 1239, our Court adopted the BIA's definition of a "social group" from *In re Acosta*: "[A] group of persons all of whom share a common immutable characteristic." 19 I.&N. Dec. 211, 233 (BIA 1985). This characteristic "might be an innate one such as sex, color, or kinship ties." *Fatin*, 12 F.3d at 1239. The immutable characteristic must, however, be one that the members cannot or should not have to change because it is fundamental to their identity. *Id.*

*Kanchaveli v. Gonzales*, No. 04-1134, 2005 U.S. App. LEXIS 11122 (3d. Cir. June 10, 2005) at 8-9. In this matter, Mr. Skendaj was threatened because of his father-in-law's public anti-Socialist position, as evidenced by the threats directed against him for marrying the daughter of the enemy of the Socialist party. Thus, the Petitioner was targeted on account of his familial relationship with his father-in-law. However, neither the Immigration Judge, the BIA, nor the Third Circuit addressed whether the familial relationship constituted the kind of kinship ties that constitute a social group.

The Third Circuit erred in failing to address whether the kinship ties created by Petitioner's marriage to Mr. Faslliaj's daughter constituted a particular social group, despite the issue being raised in Petitioner's brief.

In *Gonzales v. Thomas*, the United States Supreme Court remanded a similar case where the BIA had not yet determined whether Petitioner's family constituted a social group within the meaning of 8 U.S.C. § 1101(a)(42)(A). 547 U.S. 183 (2006); *See also, INS v. Ventura*, 537 U.S. 12 (2002). In *Gonzales*, the particular family members "were attacked and threatened because they belonged to the particular social group of 'persons related to Boss Ronnie." *Gonzales v. Thomas*, 409 F.3d 1177, 1189 (2005). In the present case, Petitioner was threatened and the taxi that he, his wife and child were riding in, was attacked, because they belonged to the particular social group of persons related to Teki Faslliaj, his father-in-law. Accordingly, because the Third Circuit did not determine whether Petitioner's family constituted a social group, this Honorable Court

should remand the case "for additional investigation or explanation." *Ventura, supra,* at 16 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); citing, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)).

The Third Circuit's conclusory statement that "substantial evidence supports the BIA conclusion that the attempted kidnapping did not constitute past persecution on account of a protected ground" is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Skendaj's Fifth Amendment rights.

## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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